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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 BRIAN SCIARA,

12 Plaintiff,

13 v.

14 STEPHEN CAMPBELL,

15 Defendant.
16

Case No.: 2:18-cv-01700-RFB-CWH

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
ORDER TO SHOW CAUSE WHY
PLAINTIFF SHOULD NOT BE HELD
IN CONTEMPT OF COURT FOR
VIOLATING THE PROTECTIVE
ORDER**

17
18 Plaintiff Brian Sciara, by and through undersigned counsel, hereby submits his
19 opposition to Defendant Stephen Campbell's Motion for Order to Show Cause Why Plaintiff
20 Should Not Be Held in Contempt.

21 **PRELIMINARY STATEMENT**

22 Defendant's motion seeks an order to show cause why Plaintiff should not be held in
23 contempt of court for an alleged willful violation of the Protective Order that was entered in
24 this matter. [ECF No. 22]. Defendant's motion further seeks an order allowing limited
25 discovery "to ascertain the full extent" of the disclosure, and the imposition of sanctions to
26 "punish and deter" Plaintiff from further violations of the Court's order.

27 Plaintiff should not be held in contempt of court because the conduct referred to by
28 Defendant as an alleged "violation" of the Protective Order was an accidental, inadvertent

1 mistake caused by Plaintiff's lack of knowledge of the protective order, not a willful violation.
 2 Moreover, Plaintiff has taken affirmative steps to rectify the disclosure of the information by
 3 sending correspondence to counsel for the one third-party entity that received the information
 4 directing it to immediately delete and destroy the information.

5 **I. STATEMENT OF FACTS**

6 Defendant Stephen Campbell (hereinafter "Defendant" or "Campbell") alleges that
 7 Plaintiff Brian Sciara (hereinafter "Plaintiff" or "Sciara") "willfully violated the Protective
 8 Order by disclosing [Defendant's] financial confidential records for his Company, MiCamp, to
 9 an unrelated third party." [ECF No. 59 at 3: 10-12]. The disclosed documents at issue in
 10 Defendant's Motion for Order to Show Cause are seven (7) pages of MiCamp Solutions,
 11 LLC's partial bank statements, from 2014, 2018, and 2019.

12 The circumstances surrounding the disclosure of MiCamp Solutions, LLC's partial
 13 bank statements are as follows:

14 1. Plaintiff was previously represented in this matter by McDonald Carano LLP.

15 2. On January 25, 2021, undersigned counsel substituted in as counsel to represent
 16 Plaintiff in the instant proceedings.

17 3. Undersigned counsel also represents Plaintiff in Case No. A-20-824100-B,
 18 which is pending in the Eighth Judicial District Court for the State of Nevada.

19 4. In the Summer/Fall of 2020, McDonald Carano LLP provided Plaintiff with
 20 documents from the instant case to provide to undersigned counsel in order to assist in the
 21 investigation of Plaintiff's claims in Case No. A-20-824100-B.

22 5. Plaintiff was not aware that some of the documents provided to him by his
 23 former counsel were subject to a Protective Order in the instant case. (*See* Declaration of Brian
 24 Sciara, attached hereto as Exhibit "1").

25 6. In Case No. A-20-824100-B, Plaintiff generally alleges that MiCamp Solutions,
 26 LLC misappropriated Plaintiff's business's identity in order to fraudulently open merchant
 27 accounts with various payment processors.

28 7. While reviewing documents produced in the instant case, Plaintiff learned that

1 two of the named Defendants in Case No. A-20-824100-B (one of which is MiCamp Solutions,
2 LLC and one of which is Fiserv Inc.), appeared to have the same individual on their respective
3 payrolls, supporting Plaintiff's claim that the Defendants conspired with each other to open
4 fraudulent merchant accounts.

5 8. Plaintiff provided undersigned counsel with MiCamp Solutions, LLC's bank
6 statements.

7 9. Undersigned counsel was not made aware that the bank statements were subject
8 to a Protective Order in the instant case. (*See* Declaration of Alanna Bondy, Esq., attached
9 hereto as Exhibit "2").

10 10. In preliminary settlement discussions with Fiserv Inc., undersigned counsel
11 provided seven (7) pages of MiCamp Solutions, LLC's bank statements to counsel for Fiserv
12 Inc., via a series of emails dated September 10, 2020, September 14, 2020, and September 21,
13 2020.

14 11. These emails were part of confidential settlement negotiations in Case No. A-
15 20-824100-B. The partial bank statements were not publicly disclosed.

16 12. Upon information and belief, Campbell learned of the disclosure from counsel
17 for Fiserv Inc.

18 13. Upon information and belief, these bank statements would be discoverable to all
19 parties, including Fiserv Inc., in Case No. A-20-824100-B, under Nev. R. Civ. P. 26.

20 14. Upon information and belief, MiCamp Solutions, LLC (a non-party in this
21 litigation), never requested the protection of the Protective Order with respect to the disclosed
22 bank statements, pursuant to Section 13 of the Protective Order.

23 15. Upon information and belief, after learning of the alleged violation of the
24 Protective Order, Defendant failed to inform Plaintiff, Plaintiff's former counsel, or Plaintiff's
25 current counsel of the unauthorized possession of MiCamp Solutions, LLC's partial bank
26 statements, pursuant to Section 14 of the Protective Order.

27 16. On February 3, 2021, Alanna Bondy, Esq., of Sgro & Roger, sent a letter to
28 counsel for Fiserv Inc., alerting Fiserv Inc. of the unauthorized disclosure and directing Fiserv

1 to return and/or destroy the partial bank statements. (See Exhibit “3”).

2 **II. LEGAL ANALYSIS**

3 **A. LEGAL STANDARD**

4 Rule 37(b) of the Federal Rules of Civil Procedure authorizes district courts to impose a
 5 wide range of sanctions, including contempt, on a party that fails to comply with a protective
 6 order. *See* Fed. R. Civ. P. 37(b)(2)(A)(vii); *see also Westinghouse Elec. Corp. v. Newman &*
 7 *Holtzinger, P.C.*, 992 F.2d 932, 934-35 (9th Cir. 1993) (citing support for the proposition that
 8 Rule 37(b)(2) should provide for enforcement of joint protective orders); *United States v. Nat'l*
 9 *Med. Enters., Inc.*, 792 F.2d 906, 910-11 (9th Cir. 1986) (upholding a Rule 37(b) sanction for a
 10 party's violation of the protective order). Civil contempt sanctions are among those imposed
 11 against individuals who violate protective orders. *See* 6 James Wm. Moore et al., *Moore's*
 12 *Federal Practice* § 26.108[2], at 26-569 (3d ed. 2018). Civil contempt is characterized by the
 13 court's desire to compel obedience to a court order, or to compensate the contemnor's
 14 adversary for the injuries which result from the noncompliance. Thus, there are two forms of
 15 civil contempt: compensatory and coercive. *Falstaff Brewing Corp. v. Miller Brewing Co.*,
 16 702 F. 2d 770, 983 U. S. App. LEXIS 29352 (9th Cir. 1983).

17 A contempt adjudication is civil in nature when the sanction imposed is wholly
 18 remedial, serves only the purposes of the complainant, and is not intended as a deterrent to
 19 offenses against the public. *McCrone v. United States*, 307 U.S. 61, 64, 83 L.Ed. 1108, 59 S.
 20 Ct. 685 (1939). A court's power to impose coercive civil contempt depends upon the ability of
 21 the contemnor to comply with the court's coercive order. *Falstaff* at 778. “The party alleging
 22 civil contempt must demonstrate that the alleged contemnor violated the court's order by ‘clear
 23 and convincing evidence,’ not merely a preponderance of the evidence.” *In re Dual—Deck*
 24 *Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993); *Vertex Distrib., Inc.*
 25 *v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). Therefore, a court may
 26 impose a civil contempt sanction only if there is clear and convincing evidence that “(1) the
 27 contemnor violated a court order, (2) the noncompliance was more than technical or de
 28 minimis (substantial compliance is not punishable as contempt), and (3) the contemnor's

conduct was not the product of a good faith or reasonable interpretation of the violated order.” 7 James Wm. Moore et al., *Moore's Federal Practice* § 37.51[7][b], at 37-110 (footnotes omitted); *see also United States v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010) (same).” “Any doubts as to whether these requirements have been met in a particular case must be resolved in favor of the party accused of the civil contempt.” 7 James Wm. Moore et al., *Moore's Federal Practice* § 37.51[7][b], at 37-110 (footnote omitted). *SolarCity Corp. v. Doria*, No. 16cv3085-JAH (RBB), 2018 U.S. Dist. LEXIS 150364, at *24-25 (S.D. Cal. Sep. 4, 2018).

On the other hand, where a judgment of contempt contains a mixture of criminal and civil elements, “the criminal aspect of the order fixes its character for purposes of procedure on review.” *Penfield Co. of California v. Securities & Exchange Commission*, 330 U.S. 585, 591, 91 L. Ed. 1117, 67 S. Ct. 918 (1947). In criminal contempt, willful disobedience must be proved beyond a reasonable doubt. *United States v. Powers*, 629 F.2d 619, 626, n.6, 627 (10th Cir. 1980). Willfulness in this context means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order. *Falstaff* at 782. Due process mandates that the court refrain from imposing harsh sanctions, such as dismissal or its equivalence, for a discovery violation except when the violation is predicated upon willfulness, bad faith, or fault of petitioner rather than inability to comply.” *Archibeque v. Atchison, Topeka & Santa Fe Rwy.*, 70 F.3d 1172, 1174 (10th Cir. 1995).

B. ANALYSIS

1. Defendant lacks standing to bring the instant motion.

As an initial matter, the financial records that were allegedly disclosed by Plaintiff are not the property of the Defendant. Rather, the partial bank statements that the Defendant is alleging were disseminated in violation of the Protective Order, are the property of MiCamp Solutions, LLC. MiCamp Solutions, LLC is not a party to this litigation. The documents in question appear to have been produced as part of an expert disclosure made by the Defendant. Upon information and belief, MiCamp Solutions, LLC, never requested the protection of the Protective Order with respect to the disclosed bank statements.

1 **2. The alleged disclosure was an accidental, inadvertent mistake.**

2 Defendant alleges that Plaintiff, through counsel, violated the Protective Order by
3 providing copies of pages from bank statements to a third-party. In support, Defendant has
4 attached to his motion copies of the bank statements at issue along with the email
5 correspondence transmitting said bank statements. Defendant incorrectly surmises that
6 production of the bank statements to a third-party was “willful” and with the intent to interfere
7 with Defendant’s business relationship with the third-party without the slightest support for
8 this assertion. Notably, Plaintiff’s Motion is not verified nor supported by a sworn affidavit or
9 declaration of the Defendant. As will be set forth below, the disclosure of the bank statements
10 subject to the Protective Order was inadvertent, a mistake and not willful.

11 As is evident from the emails that accompanied the bank statements, Plaintiff was
12 engaged in discussions with counsel for the third-party (Fiserv) in response to a settlement
13 demand Plaintiff served on Fiserv related to claims against Fiserv and others that they allowed
14 MiCamp to open merchant accounts with Fiserv knowing that the company opening the
15 accounts was using Plaintiff’s or his company’s identifying information. Part of the basis for
16 those claims is the belief that a Fiserv employee was being paid by MiCamp for his/her
17 involvement in that fraud. As part of those settlement discussions, Fiserv requested proof that
18 the Fiserv employee was acting in a dual role and had received payment from MiCamp.
19 Plaintiff had seen bank statements of MiCamp produced in discovery in this case that seemed
20 to confirm this belief. He provided pages from those bank statements, along with a screenshot
21 of one page and a text message to counsel.

22 At no time did Plaintiff realize that the bank statements at issue were subject to a
23 protective order. (Exhibit “1”). In fact, Plaintiff was not aware that a “protective order”
24 existed in the case. (Exhibit “1”). By the same token, undersigned counsel for Plaintiff was
25 unaware of a protective order in this case since Plaintiff was represented by different attorneys
26 at a different law firm. (Exhibit “2”). Only recently, on January 25, 2021, undersigned
27 counsel appeared for the first time as counsel for Plaintiff in this case. Further, Plaintiff had no
28 reason to believe that he could not share documents and information gleaned from this matter

1 with the attorneys representing him in a separate matter. In fact, the Protective Order allows
 2 the parties to disclose Confidential Information to their counsel.

3 Section 10 [sic] provides:

4 **Persons Authorized to Receive Confidential Information.** Confidential
 5 Information produced pursuant to this Protective Order may be disclosed or
 6 made available only to the Court, court personnel, and to the persons below:

7 (a) A *party*, or officers, directors, and employees of a party deemed
 8 necessary by counsel to aid in the prosecution, defense, or
 9 settlement of this action;

10 (b) *Counsel for a party* and its affiliates (including in-house
 11 attorneys, *outside attorneys*, and paralegal, clerical, litigation
 12 support staff, and secretarial staff employed by such counsel);

13 ...

14 Any person to whom Confidential Information is disclosed pursuant to subparts
 15 (a), (b), ... above shall be advised that the Confidential Information is being
 16 disclosed pursuant to an order of the Court, that the information may not be
 17 disclosed by such person to any person not permitted to have access to the
 18 Confidential Information pursuant to this Protective Order, and that any
 19 violation of this Protective Order may result in the imposition of such sanctions
 20 as the Court deems proper.

17 3. Defendant has suffered no harm.

18 The bank statements at issue were not those of Defendant. The bank statements belong
 19 to MiCamp Solutions. MiCamp Solutions has not filed a motion to intervene in these
 20 proceedings and has not brought the instant motion.

21 More importantly, the bank statements are relevant to issues raised by the State Court
 22 case brought by Plaintiff against MiCamp Solutions and others, including Fiserv, the third-
 23 party recipient of the bank statements. The allegations in the State Court action include that
 24 MiCamp and Fiserv were knowingly involved in activities that allowed MiCamp to open
 25 merchant accounts with Fiserv using Plaintiff's business identity. It is alleged that an
 26 employee of Fiserv was also being paid as an employee by MiCamp. Proof of that relationship
 27 is demonstrated on MiCamp's bank statements. The bank statements at issue would be
 28 discoverable to Fiserv in that case.

1 **4. Limited discovery on the extent of disclosure is not appropriate.**

2 Defendant's request for an order allowing limited discovery and an evidentiary hearing
3 "to ascertain the full extent" of the violation of the Protective Order is not warranted or
4 necessary in this case. Plaintiff, through his counsel, has provided a declaration confirming,
5 under penalty of perjury, that apart from the seven (7) pages of MiCamp Solutions, LLC's
6 partial bank statements, no other documents that are subject to the Protective Order in this
7 matter have been disclosed to any third-party. (See Exhibit "3" ¶ 9).

8 Additionally, Defendant failed to comply with the procedures outlined in Section 14 of
9 the Protective Order when it learned of the alleged unauthorized disclosure of MiCamp
10 Holdings, LLC's partial bank statements. Section 14 of the Protective Order explicitly provides
11 that a party that learns of the unauthorized disclosure of any information protected by the
12 Protective Order *shall* "immediately notify in writing the other parties." [ECF No. 22, ¶ 14].
13 Thereafter, "the parties shall work cooperatively to prevent its recurrence." *Id.* However,
14 instead of following the procedures outlined in Section 14 to try to minimize the potential harm
15 caused by Plaintiff's alleged violation of the Protective Order, and instead of approaching
16 Plaintiff's counsel to ascertain the full extent of the alleged violation, Defendant proceeded to
17 file a *Motion for Order to Show Cause* seeking sanctions, up to and including case terminating
18 sanctions.

19 Defendant's failure to comply with the procedures outlined in Section 14 of the
20 Protective Order should preclude the Defendant from attempting to engage in an extended and
21 unnecessary search for other alleged violations of the Protective Order. Defendant has
22 presented no credible evidence to show that he has any reason to believe that additional
23 protected materials were disclosed to third-parties. Instead, it appears that Defendant is
24 attempting to use a frankly very minor and inadvertent mistake to engage in costly discovery
25 and further proceedings to drive up the cost of litigation for the Plaintiff.

26 **5. Monetary sanctions and/or the award of attorneys' fee is not**
27 **warranted.**

28 Defendant seeks an award of sanctions and/or attorneys' fees from Plaintiff for the
alleged violation of the Protective Order. That request presupposes that the Court will find

1 Plaintiff willfully violated the Protective Order which he did not. However, if the Court
 2 reaches the issues of the imposition of sanctions, it is important to consider that Defendant
 3 needless incurred attorney's fees and costs associated with bringing the instant motion because
 4 the procedure for addressing a potential violation of the Protective Order is set forth in the
 5 Protective Order itself. Section 14 provides:

6 **Knowledge of Unauthorized Use or Possession.** If any party learns of any
 7 unauthorized possession, knowledge, use or disclosure of any Confidential
 8 Information or Highly Confidential Information, the party shall immediately
 9 notify in writing the other parties. The party learning of such unauthorized
 10 possession, knowledge, use or disclosure shall promptly furnish the other parties
 11 with the full details of such possession, knowledge, use or disclosure. With
 12 respect to such unauthorized possession, knowledge, use or disclosure the
 13 parties shall work cooperatively to prevent its recurrence.

14 Defendant did not follow the measures set forth in Section 14, and instead chose to file
 15 the instant motion. Receipt of a copy of the filed Motion was the first instance Plaintiff or
 16 Plaintiff's current counsel learned that Defendant believed there was a violation of the
 17 Protective Order. Upon information and belief, Defendant did not contact prior counsel who
 18 was representing Plaintiff in this case at that time, either. The purpose of Paragraph 14 of the
 19 Protective Order is to afford the parties, including the alleged breaching party, an opportunity
 20 to analyze and discuss what occurred and to develop a means to prevent any potential
 21 unauthorized disclosure in the future. Plaintiff was denied the opportunity to remedy the
 22 situation. Defendant's failure to notify Plaintiff or Plaintiff's counsel of the alleged violation
 23 by filing the instant motion, caused Defendant to incur unnecessary and avoidable attorneys'
 24 fees and costs. Defendant should not be rewarded for his conduct.

25 **6. Evidentiary sanctions and dismissal are improper.**

26 Courts should use dismissal of an action with prejudice or its equivalent as "a weapon
 27 of last, rather than first, resort." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).
 28 Such harsh sanctions are usually appropriate only when a lesser sanction does not serve the
 interests of justice. *Gocolay v. New Mex. Fed. Sav. & Loan Ass'n*, 968 F.2d 1017, 1021 (10th
 Cir. 1992). There are five (5) factors the court must consider to determine if good cause exists
 to dismiss a case. The factors include: (1) the degree of actual prejudice to the defendant, (2)

1 the amount of interference with the judicial process, (3) the culpability of the litigant, (4)
 2 whether the court warned the party in advance that dismissal of the action would be a likely
 3 sanction for noncompliance, and (5) the efficacy of lesser sanctions. *Jones v. Thompson*, 996
 4 F.2d 261, 264 (10th Cir. 1993).

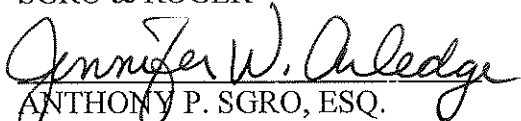
5 Applying the five (5) factors to the instant case: (1) Defendant has offered no evidence
 6 of actual prejudice. There are but mere assertions of harm in the Motion. (2) The alleged
 7 disclosure has not interfered with the judicial process. It has not created any delay in these
 8 proceedings. (3) Plaintiff's actions were inadvertent and unintentional. (4) Plaintiff has not
 9 been warned by the Court in advance that the action would be dismissed for noncompliance.
 10 (5) If any sanctions are awarded, there is no reason to believe that they would be insufficient to
 11 obtain the desired result. Based on the foregoing, dismissal would be inappropriate.

12 **III. CONCLUSION**

13 For the foregoing reasons, Defendant's Motion should be denied its entirety.

14 Dated this 3rd day of February, 2021.

15 Respectfully submitted,
 16 SGRO & ROGER

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24 Attorneys for Plaintiff Brian Sciara

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that the foregoing PLAINTIFF'S
OPPOSITION TO DEFENDANT'S MOTION FOR ORDER TO SHOW CAUSE WHY
PLAINTIFF SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR VIOLATING
THE PROTECTIVE ORDER was submitted electronically for filing and/or service on the
30th day of February, 2021.

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BY 

An Employee of Sgro & Roger